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CITATIONS

CASES:

STATUTES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 724

BEN E. GOODWIN and M. R. GOODWIN, doing business as BEN E. GOODWIN COMPANY,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (C. C. A. R.[1] 23-29) is reported at 165 F. 2d 334. The

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[1] The record consists of three parts, which have not been paginated consecutively. The record of proceedings in the district court originally filed in the circuit court of appeals will be referred to as "R."; the supplemental record of proceedings in the district court will be designated "Supp. R."; and the record of proceedings in the circuit court of appeals will be designated "C. C. A. R."

opinion of the district court (R. 61-64) is reported at 68 F. Supp. 949.

JURISDICTION

The judgment of the circuit court of appeals was entered January 16, 1948 (C. C. A. R. 30), and a petition for rehearing (C. C. A. R. 31-37) was denied February 17, 1948 (C. C. A. R. 39). The petition for a writ of certiorari was filed April 7, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a treble damage action instituted under Section 205(e) of the Emergency Price Control Act in the name of Chester Bowles, Price Administrator, may now be continued in the name of the United States.

2. Whether Philip B. Fleming, Temporary Controls Administrator, successor in office to the Price Administrator under the Emergency Price Control Act, had standing to appeal from the district court's dismissal of the action, where Fleming had moved to be substituted as plaintiff in the district court, but his motion had not been acted upon before the appeal was noticed.

RULE INVOLVED

Rule 25(d), Federal Rules of Civil Procedure, provides:

> (d) *Public Officers: Death or Separation From Office.*—When an officer of the United

States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

STATEMENT

In September 1945, Chester Bowles, then Price Administrator, instituted on behalf of the United States a treble damage action against petitioners under the Emergency Price Control Act (R. 1-2). A motion to substitute Paul A. Porter in place of Bowles was filed on August 23, 1946, and noticed for hearing on August 28, 1946 (R. 4-5). This motion recited that Bowles had resigned as Price Administrator and that Porter had been sworn in as his successor on March 19, 1946. On August 30,

1946, the court granted the motion (R. 37-42). On October 1, 1946, however, Porter advised the court that in fact he had taken his oath of office as Price Administrator on February 26, 1946, and suggested that the order granting substitution, issued on the erroneous factual allegation, be withdrawn (R. 48-49). The order was set aside on October 2, 1946 (R. 51-52). On November 1, 1946, an order (R. 52-53) and accompanying memorandum opinion (R. 61-64) were entered denying substitution of Porter for Bowles and granting petitioners' motion for abatement and dismissal of the action, which had been filed on September 9, 1946 (R. 44-45). On December 12, 1946, the Office of Price Administration was abolished and its functions under the Act were transferred to the Office of Temporary Controls by Executive Order No. 9809,[2] and Philip B. Fleming took office as Temporary Controls Administrator. On January 20, 1947, Fleming moved to be substituted as plaintiff in place of Porter (R. 53-54). This motion was heard on January 24, 1947, and the court reserved ruling on it (Supp. R. 7). On January 29, 1947, Fleming filed a notice of appeal from the order of November 1, 1946, denying substitution of Porter and dismissing the action (R. 55-56).

Executive Order No. 9841,[3] issued April 23, 1947, provided for the termination of the Office of Temporary Controls. Executive Order No. 9842[4] was

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[2] 11 F. R. 14281.
[3] 12 F. R. 2645.
[4] 12 F. R. 2646.

issued also on April 23, 1947, and provided that as of June 1, 1947:

> The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend: * * *
>
> (b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control; * * *.

On June 18, 1947, the Government moved in the circuit court of appeals for the substitution of the United States as appellant (C. C. A. R. 5-6). Petitioners moved to dismiss the appeal on June 20, 1947 (C. C. A. R. 6-10), and on June 23, 1947, filed objections to the substitution of the United States as appellant (C. C. A. R. 11-16). On January 16, 1948, the circuit court of appeals granted the Government's motion for substitution of the United States, denied petitioners' motion to dismiss the appeal (C. C. A. R. 29), and entered judgment vacating the order of the district court appealed from and remanding the case for trial on the merits (C. C. A. R. 30). In its opinion (C. C. A. R. 23-29), the court below held that Rule 25(d) of the Federal Rules of Civil Procedure did not require abatement of the action on the resignation of Bowles, and that substitution of the United States as appellant was merely a formal matter "to keep the record straight."

ARGUMENT

1. We believe that Rule 25(d) of the Federal Rules of Civil Procedure, providing for the substitution of successor government officers,[5] does not apply in the present case, since the question here presented is not one of substituting a successor in office, but rather is whether an action commenced pursuant to statutory authority in the name of a government officer on behalf of the United States may be continued in the name of the United States. Section 205(e) of the Emergency Price Control Act permits (*Porter* v. *Pure Oil Co.*, 7 F. R. D. 577, 579 (E. D. Pa), reprinted C. C. A. R. 19-21) the Price Administrator to bring treble damage actions "on behalf of the United States." A right of action vested in the Administrator under the Act is a right of the United States, which may be asserted by the United States. Cf. *United States* v. *Summerlin,* 310 U. S. 414, 416. Since an action so brought in the name of the Administrator is actually a suit by the United States as the real party in interest (*Porter* v. *Maule,* 160 F. 2d 1, 3 (C. C. A. 5); *United States* v. *Saunders Petroleum Co., Inc.,* 7 F. R. D. 608 (W. D. Mo.); *Bowles* v. *Ell-Carr*

[5] It is not entirely clear whether technically Rule 25(d) of the Federal Rules of Civil Procedure or Rule 19(4) of the Rules of this Court, incorporating Section 11 of the Act of February 13, 1925 (c. 229, 43 Stat. 941, 28 U. S. C. 780), is the relevant provision. Since this Court in *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119, referred only to Rule 25(d), we have assumed throughout this brief that this is the governing provision. We believe there is no difference between that rule and the statute so far as the present case is concerned.

Co., Inc., 71 Supp. 482 (S. D. N. Y.)),[6] permitting it to continue in the name of the United States "is not technically a matter of making a new party at all." *United States* v. *Koike*, 164 F. 2d 155, 157 (C. C. A. 9). Cf. *Porter* v. *Pure Oil Co., supra; Bowles* v. *Goldman*, 7 F. R. D. 12 (W. D. Pa.); *Porter* v. *American Distilling Co.*, 71 F. Supp. 483, 488 (S. D. N. Y.) *Porter* v. *Steger*, 74 F. Supp. 109 (D. Md.) We submit that the court below correctly ruled that since the present action was "in substance and reality, at all times a controversy between the Government and the appellees," Rule 25(d) is not applicable, and that the substitution of the United States as party plaintiff "amounts to nothing more than a formal amendment to the title of the action to conform it to the truth." (C. C. A., R. 28.)

2. The district court was in error in holding (R. 62-63) that the action abated under 28 U. S. C. 780 and Rule 25(d) of the Rules of Civil Procedure because no showing of substantial need to continue the action in the name of Porter was made within six months after Porter succeeded Bowles as Price

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[6] In *Bowles* v. *Ohlhausen*, 71 F. Supp. 199, 200 (N. D. Ill.), one of the two cases cited by petitioners (Pet. 14) as contrary to the decision below, the court accepted the Government's position that the United States is the real party in interest. It held, however, that Rule 25(d) applies to treble damage suits brought by the Administrator. The *Ohlhausen* case, which is now pending on appeal in the Circuit Court of Appeals for the Seventh Circuit (No. 9435), is distinguishable from the present case in that there the motion to substitute Porter was not made within six months after he succeeded Bowles. See Point 2, *infra*.

Administrator.[7] Porter succeeded Bowles on February 26, 1946 (R. 50). Thus, under Rule 25(d), substitution was proper if a showing of substantial need to continue the action in the name of Porter had been made at any time through August 26, 1946, The motion for substution was filed with the court on August 23, 1946. In *Fleming* v. *Mohawk Co., supra,* 331 U. S. at 119, this Court held that the provisions of the Emergency Price Control Act themselves showed "substantial need" for continuing actions for enforcement of administrative subpoenas because rights and liabilities accruing during price control were not wiped out by the termination of the Act. *Cf. Porter* v. *American National Bank & Trust Co.,* 161 F. 2d 504 (C. C. A. 7). *A fortiori* there is substantial need for continuing a treble damage action commenced prior to the expiration of the Act. *United States* v. *Koike, supra; Porter* v. *American Distilling Co., supra; Porter* v. *Bowers,* 70 F. Supp. 751, 758 (W. D. Mo.). Thus, the showing of substantial need was made in this case by the filing of the motion, which

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[7] The circuit court of appeals held that Rule 25(d) did not apply at any stage of the proceedings (C. C. A. R. 25-28). While we believe that the court was right in this respect, there is no occasion to give consideration to this point since there was, we submit, full compliance with the rule.

Fix v. *Philadelphia Barge Co.,* 290 U. S. 530; *Fleming* v. *Mohawk Co., supra;* and *State of Oklahoma ex rel. McVey* v. *Magnolia Petroleum Company,* 114 F. 2d 111 (C. C. A. 10) (Pet. 6-7, 12-13, 15, 17), are relevant only to the question of the applicability of Rule 25(d). It is, therefore, unnecessary to discuss them here. We think however, that they are all distinguishable from the instant case and do not support petitioners' conclusion.

was done on August 23, 1946, within six months after Porter took office. The district court ruled that because of Rule 6(d), "no action could be taken nor showing made until five days after the filing of said motion" (R. 62). Rule 6(d) provides:

> A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, * * *.

However, it has consistently been held that motions by government officers for substitution under Rule 25(d) may be heard *ex parte. Bowles* v. *Weiner,* 6 F. R. D. 540 (E. D. Mich.); *Bowles* v. *Goldman, supra; Porter* v. *Woodruff,* 7 F. R. D. 391 (W. D. N. Y.); *In re Creedon,* 7 F. R. D. 546 (W. D. N. Y.); *Bowles* v. *Blue Ribbon Provisions,* 7 F. R. D. 603 (E. D. N. Y.); *Bowles* v. *Kent County Motor Co.,* 6 F. R. D. 515, 516 (D. Del.).[8] In the case last cited, the court expressed the opinion that the district court in the present case (*Porter* v. *Goodwin,* 68 F. Supp. 949; R. 62) was in error in "impliedly holding that Rule 6(d) cuts down by five days the six months' period for making the substitution."

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[8] These cases reach this result on the basis of the express language of Rule 25(d), which requires notice only to "the party or officer to be affected." See *Bowles* v. *Weiner, supra,* 6 F. R. D. at 542: "It is therefore the successor-officer who is the party affected and to whom notice is required to be given, and not the opposite party. * * * the defendants are in no manner affected by the substitution of parties plaintiff in this case, and * * * they have not been in any manner prejudiced thereby."

In entering final judgment in *Bowles* v. *Babar*, 54 F. Supp. 453, 455 (E. D. Mich.), the court on its own motion substituted Chester Bowles for Prentiss Brown as Price Administrator "for orderliness of this record." In several federal districts general orders of substitution in actions under the Emergency Price Control Act have been issued. Cf. *Bowles* v. *Weiner, supra; Bowles* v. *Goldman, supra; In re Creedon, supra; Porter* v. *Sands*, 74 F. Supp. 494 (E. D. N. Y.).

Fleming's motion for substitution was made within two months after he assumed office.[9]

Bowles v. *Seigel*, 7 F. R. D. 331 (D. D. C.)[10] and *Bowles* v. *Ohlhausen, supra*, the only cases cited by petitioners as directly contrary to the decision of the court below (Pet. 14), are clearly distinguishable from the instant case, in that in neither of those cases was a motion for substitution made within six months after the successor Price Administer took office.

3. Petitioners' contention (Pet. 5, 19-23) that the appeal should have been dismissed because taken in the name of Fleming, who had not been

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[9] Clearly Rule 25(d) could have no applicability to the substitution of the United States as nominal party plaintiff. See Point 1, *supra*. In any event, it should be observed that the motion to "substitute" the United States was made within three weeks after the effective date of Executive Order 9842.

[10] In connection with the *Seigel* case, it should be noted that the court of appeals dismissed the appeal on other grounds (see *infra*, Point 3), expressly refraining from passing on the applicability of Rule 25(d). *United States* v. *Seigel*, App. D. C., No. 9616, not yet reported.

made a party of record, is manifestly without substance. The present action had been commenced in the name of Price Administrator Bowles. The subsequent motion to substitute Porter for Bowles was denied and the case dismissed on November 1, 1946. Before the time for appeal had expired, Porter ceased to hold the office and Fleming succeeded to the position. A motion was made to substitute Fleming, who had succeeded to Porter's right to sue on behalf of the Government. This motion was heard on January 24, 1947 (R. 53-55), and the court reserved decision thereon (Supp. R. 7). The appeal was filed on January 29, 1947. As expiration of the time for filing a notice of appeal from the order dismissing the action approached, the Government obviously was in a dilemma. The alternative possibilities were to file the appeal in the name of Bowles, Porter, Fleming, or the United States. Neither Bowles nor Porter at that time had any interest, nominal or real, in the action; technically, neither of them was any longer authorized to represent the Government in litigation. Although we believe the appeal could have been filed in the name of the United States, since it was the real party in interest, it had been the uniform practice to bring actions under Section 205 of the Act in the name of the Administrator "for purposes of identification and classification." *Porter* v. *Pure Oil Co., supra,* 7 F. R. D. at 579. There appeared to be no reason to change the practice in this case. Fleming was at the time the duly authorized Government agent to prosecute such litiga-

tion. Although a failure to move for substitution of Fleming in the district court would not have invalidated an appeal taken in the name of Bowles or Porter (*Porter* v. *Maule, supra*, 160 F. 2d at 3),[11] there appears to be no possible ground for arguing that the appeal was required to be prosecuted in the name of a person who no longer held the office. If petitioners were correct in their objection to the allowance of an appeal in the name of Fleming and to the substitution of the United States (Pet. 5, 11), the result would be either that the appeal had to be prosecuted in the name of a person having no interest or, what is equally untenable, that no appeal from the dismissal could be filed. Cf. *Porter* v. *Pure Oil Co., supra.*

United States v. *Seigel, supra,* relied on by petitioners (Pet. 22), does not support their position. In that case a complaint was filed in the name of Chester Bowles, Price Administrator. No motions were made to substitute either Porter or Fleming. On April 18, 1947, the defendant moved to dismiss for failure to substitute under Rule 25(d) and 28 U. S. C. 780. Judgment dismissing the complaint was entered on July 10, 1947. A notice of appeal was filed by "the United States, the real party in interest," although the United States had not moved to be substituted as plaintiff. In dismissing the appeal on the ground that the United States had no standing to appeal, the court of appeals emphasized that the United States "never made

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[11] Cf. *Bragg* v. *Gerstel*, 148 F. 2d 757 (C. C. A. 5).

any attempt to become a party" in the district court.[12] In the present case both Fleming and his predecessor did attempt to become parties and the court in the *Seigel* case distinguished the instant case on that ground.

The other cases cited by petitioners (Pet. 22-23) are clearly distinguishable from the instant case. In *Taylor* v. *Logan Trust Co.*, 289 Fed. 51 (C. C. A. 8), appellants moved for leave to intervene as third parties in the district court, but did not appeal from the denial of intervention. In the present case Fleming did not seek to intervene as a third party, but rather sought to be substituted as plaintiff. Further, within the proper time he followed the only apparent avenue of appealing from the action of the district court.

In *Louisiana* v. *Jack*, 244 U. S. 397, cited by petitioners (Pet. 23), the State of Louisiana attempted to appeal from a judgment confirming a settlement of an action by a state levee board. The Louisiana Supreme Court had previously held that under Louisiana statutes all title to the land involved and all right to sue and be sued in connection therewith had been vested in the levee board, there was no coordinate power in the governor or attorney general, and that, therefore, under Louisiana law, there was no power to institute a suit in

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[12] We believe the *Seigel* decision to be wrong. It is our opinion that since the United States was always the real party in interest, it had the right at any time to appear as plaintiff without having to move for substitution. This was the view taken in the dissenting opinion of Judge Edgerton in the *Seigel* case.

the name of the State. This Court felt itself bound by the Louisiana court's construction of the applicable state law. The Court reaffirmed its prior holdings that an appeal may be taken only by one who is "a party or privy to the record." (p. 402). Certainly Fleming and the United States were at least privies in the present action.

In *South Carolina* v. *Wesley,* 155 U. S. 542 (see Pet. 23), the State of South Carolina had sought to have the lower court set aside a judgment in a case to which it had not been a party. The state in that case had expressly refused to submit its rights to the jurisdiction of the court, and did not complain that it was refused leave to intervene. In the instant case Fleming sought to be made a party of record, and submitted the Government's claim to the jurisdiction of the court.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578 (see Pet. 23), is entirely inapposite. It involved the right of persons having at most a general, indirect interest in a proceeding to invoke mandamus in this Court to compel the circuit court to admit petitioner as a party for the purpose of making the circuit court obey a mandate previously issued by this Court.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari presents no question warranting further review by this Court. The petition should, therefore, be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

ROBERT S. ERDAHL,
JOSEPHINE H. KLEIN,
Attorneys.

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